

Bickham v. Sub Sea International, Inc.: Partial Release from a Procedural Trap?

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NOTE

***Bickham v. Sub Sea International, Inc.*: Partial Release from a Procedural Trap?**

I. INTRODUCTION

In *Bickham v. Sub Sea International, Inc.*,¹ the Louisiana Supreme Court holds that a defendant who files a declinatory exception of improper venue may also file an answer within the same pleading and, thereafter, engage in discovery without making a general appearance that would waive the pending declinatory exception. This case is important to Louisiana practitioners because the ruling provides a partial release from a procedural trap. Prior to *Bickham*, a defendant had to file his declinatory exception of improper venue and wait for a ruling thereon before filing an answer or engaging in discovery. To do otherwise would waive the pending exception and subject the defendant to the plaintiff's choice of forum.

After *Bickham*, a defendant can safely answer and except to venue in the same pleading, and immediately launch into discovery (or respond to it), even though the discovery goes to the merits of the case, before the exception is heard. Prior to *Bickham*, engaging in discovery relating to the merits of the case rather than strictly limiting discovery to the merits of the exception waived the pending exception. It was not always clear when a question overstepped these limits. Likewise, filing motions, peremptory exceptions, or other pleadings would subject a defendant to jurisdiction when such was not his intent. These actions by a defendant were considered a "seeking of relief" under Louisiana Code of Civil Procedure article 7,² and served as a general appearance

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1. 617 So. 2d 483 (La. 1993).

2. La. Code Civ. P. art. 7 provides:

A. Except as otherwise provided in this Article, a party makes a general appearance which subjects him to the jurisdiction of the court and impliedly waives all objections thereto when, either personally or through counsel, he seeks therein any relief other than:

- (1) Entry or removal of the name of an attorney as counsel of record;
- (2) Extension of time within which to plead;
- (3) Security for costs;
- (4) Dissolution of an attachment issued on the ground of the nonresidence of the defendant; or
- (5) Dismissal of the action on the ground that the court has no jurisdiction over the defendant.

B. This Article does not apply to an incompetent defendant who attempts to appear personally, or to an absent or incompetent defendant who appears through the attorney at law appointed by the court to represent him.

C. When a defendant files a declinatory exception which includes a prayer for the dismissal of the action on the ground that the court has no jurisdiction over him, the pleading of other objections therein, the filing of the dilatory and peremptory exceptions

precluding a defendant from pursuing his previously filed, pending exception.

Bickham allows the declinatory exception challenging jurisdiction and the answer acquiescing in jurisdiction to be filed simultaneously because of judicial efficiency. Further, which appears first in the pleading is irrelevant. *Bickham* extends the concept of judicial efficiency so the exception is no longer required to be heard before engaging in other activities that might constitute a general appearance. This is so, even though it is logically inconsistent to use a general appearance (the answer) when a limited appearance (the exception) immediately follows. The function and logic behind the limited appearance is to challenge the plaintiff's choice of forum, whereas the function and logic of the general appearance is to prepare for trial in that forum. The goals of judicial efficiency by eliminating these technicalities conflict with the logic and intent of the specific procedural rules. However, regardless of this inconsistency, *Bickham* removes some procedural traps for the unwary.

Part II discusses Louisiana's procedural philosophy and the function, policy, and logic of the Louisiana Code of Civil Procedure. Thereafter follows a discussion of Louisiana's procedural law regarding the exception, limited appearance, and general appearance. Part III illustrates problems that have arisen in Louisiana jurisprudence between a defendant's use of exceptions to contest jurisdiction and other acts of a defendant that subject him to jurisdiction when such was not his intent. Part IV discusses the *Bickham* case. Parts V and VI contemplate the changes in Louisiana procedure brought about as a result of *Bickham*, including what can be expected when filing an answer or participating in discovery when a declinatory exception is filed. Part VII describes the federal procedural system—philosophy, goals, and rules. A comparison of the federal rules with the Louisiana rules follows. The paper concludes in Part VIII with a summary of the issues left unresolved by *Bickham* and proposed revisions in Louisiana procedural law.

II. LOUISIANA CODE OF CIVIL PROCEDURE

A. Louisiana's Procedural Philosophy

The Code of Practice of 1825 was the first code in Louisiana devoted to procedural aspects of the practice of law. The revision of 1870 eliminated all references to the institution of slavery and incorporated special legislation on procedural matters adopted between 1825 and 1870. Eventually, by 1960, considerable bodies of procedural law could be found in the Civil Code, in a mass of special statutes adopted since 1870, in jurisprudence of Louisiana courts, and to a smaller extent, in custom and usage by the legal profession. This

therewith, or the filing of an answer therewith when required by law, does not constitute a general appearance.

prompted the legislature to mandate the Louisiana Law Institute to revise civil procedure in Louisiana.³

The procedural philosophy of the new code is reflected in a number of its articles. The reporters worked with the "simple premise that lawsuits should be decided on their merits, and should not turn on arbitrary or technical rules of procedure."⁴ This procedural philosophy is embodied in Louisiana Code of Civil Procedure article 5051: "The articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves."⁵ The reporters' comment following this new article reads: "This article expresses the procedural philosophy of this Code and serves as a constant reminder to the bench and bar that procedural rules are only a means to an end, and not an end in themselves."⁶ Discussion of the *Bickham* case in Part IV of this paper will analyze whether this stated procedural philosophy was applied in this recent supreme court decision.

B. Exceptions, Limited Appearances, and General Appearances in Louisiana

Louisiana courts, unlike federal courts, allow the use of a declinatory exception to contest jurisdiction of the court over a defendant.⁷ All the declinatory exceptions listed in Louisiana Code of Civil Procedure article 925 challenge the court's jurisdiction and are "limited appearances" under Article 7.

3. Louisiana State Law Institute, Report to Accompany Project of Proposed Louisiana Code of Civil Procedure, at xi-xiii (1960).

4. *Id.* at xiii.

5. La. Code Civ. P. art. 5051.

6. See La. Code Civ. P. art. 5051 cmt.

7. La. Code Civ. P. art. 923 provides:

The function of the declinatory exception is to decline the jurisdiction of the court, while the dilatory exception merely retards the progress of the action, but neither exception tends to defeat the action. The function of the peremptory exception is to have the plaintiff's action declared legally nonexistent, or barred by effect of law, and hence this exception tends to dismiss or defeat the action.

La. Code Civ. P. art. 925 provides:

The objections which may be raised through the declinatory exception include, but are not limited to, the following:

- (1) Insufficiency of citation;
- (2) Insufficiency of service of process;
- (3) *Lis pendens*;
- (4) Improper venue;
- (5) The court's lack of jurisdiction over the person of defendant; and
- (6) The court's lack of jurisdiction over the subject matter of the action.

When two or more of these objections are pleaded in the declinatory exception, they need not be pleaded in the alternative or in any particular order.

When a defendant makes an appearance, all objections which may be raised through the declinatory exception, except the court's lack of jurisdiction over the subject matter of the action, are waived unless pleaded therein.

The declinatory exception must be pleaded prior to answer or judgment by default.⁸ When pleaded before the answer, the exception must be tried and decided in advance of the trial of the case.⁹

When a defendant makes an appearance (limited or general), all objections which may be raised through the declinatory exception, except lack of subject matter jurisdiction, are waived unless pleaded therein.¹⁰ Thus, all declinatory exceptions must be pleaded at the same time. A party may not make an appearance and reserve objections.¹¹

Pursuant to Louisiana Code of Civil Procedure article 7, a party makes a general appearance subjecting himself to the court's jurisdiction, impliedly waiving all objections thereto, when he asks the court for *any relief, other than:*

- (1) Entry or removal of the name of an attorney as counsel of record;
- (2) Extension of time within which to plead;
- (3) Security for costs;
- (4) Dissolution of an attachment issued on the ground of the nonresidence of the defendant; or
- (5) *Dismissal of the action on the ground that the court has no jurisdiction over the defendant.*¹²

Therefore, the only limited appearances in Louisiana are found in subparts (1)-(5) of Article 7.

Not only must all declinatory exceptions be filed together,¹³ but the code stretches the logic of the limited appearance in the interests of judicial efficiency by requiring that any dilatory exceptions¹⁴ must be filed togeth-

8. La. Code Civ. P. art. 928(A).

9. La. Code Civ. P. art. 929.

10. See La. Code Civ. P. art. 925.

11. See La. Code Civ. P. art. 925 n., in Louisiana Code of Civil Procedure (William E. Crawford ed., West 1994). But see *Delay v. Charbonnet*, 627 So. 2d 720 (La. App. 4th Cir. 1993), in which the defendant insurer filed a declinatory exception to personal jurisdiction. The exception was denied. The defendant thereafter filed an answer and asserted it was not waiving its objection to jurisdiction. The individual defendants settled the claim, and the insurer filed a peremptory exception of res judicata. This exception was denied. The insurer re-urged its exception to jurisdiction, and the judge maintained the exception and dismissed the plaintiff's suit, even though the insurer did not again reserve its right to contest jurisdiction when it filed the peremptory exception. *Id.* at 722. The trial judge relied on *Bickham* in finding the peremptory exception of res judicata did not constitute a waiver of its exception of lack of personal jurisdiction. *Id.*

12. La. Code Civ. P. art. 7 (emphasis added). See also La. Code Civ. P. art. 7 n., in Louisiana Code of Civil Procedure, *supra* note 11.

13. La. Code Civ. P. art. 925.

14. La. Code Civ. P. art. 926 provides:

The objections which may be raised through the dilatory exception include, but are not limited to, the following:

- (1) Prematurity;
- (2) Want of amicable demand;
- (3) Unauthorized use of summary proceeding;

er,¹⁵ along with any declinatory exceptions,¹⁶ and that the peremptory exceptions may also be filed with the declinatory exceptions.¹⁷ For example, a defendant *must* file any objections to jurisdiction, venue, and joinder together or lose them, pursuant to Article 928(A), and *may* also add defenses of prescription and no cause of action, pursuant to Article 928(B).

Louisiana's procedural philosophy, as expressed in the Louisiana Code of Civil Procedure and the report accompanying the *projet* to the code, entails the elimination of meaningless procedural technicalities and increased judicial efficiency. Toward this goal, the code requires all dilatory and declinatory exceptions be filed together¹⁸ to avoid "stringing out" the exceptions, even though the functions of the exceptions differ.¹⁹ Because the dilatory exception is filed merely to delay or retard the suit (a general appearance and seeking of relief), whereas the declinatory exception would decline the court's jurisdiction (a limited appearance challenging jurisdiction), the Louisiana goal of judicial efficiency conflicts with the logic behind the use of limited and general appearances. The logic or purpose of the limited appearance is that the parties should not, on the one hand, file pleadings asserting "this court has no control over me," and at the same time, file pleadings asserting "here is my answer and discovery so we may move this case toward trial." As long as Louisiana continues using the limited appearance, it will conflict with the philosophy of the Code of Civil Procedure—judicial efficiency and elimination of technicalities.

These conflicts, and interpretation of cases involving these conflicts, have resulted in inconsistencies in Louisiana law that serve as traps for the unwary. *Bickham v. Sub Sea International, Inc.*, a case in which the inconsistencies and traps are evident, provides only a partial release from these procedural traps.

(4) Nonconformity of the petition with any of the requirements of Article 891;

(5) Vagueness or ambiguity of the petition;

(6) Lack of procedural capacity;

(7) Improper cumulation of actions, including improper joinder of parties;

(8) Nonjoinder of necessary party; and

(9) Discussion.

All objections which may be raised through the dilatory exception are waived unless pleaded therein.

15. See La. Code Civ. P. art. 926 cmt., in Louisiana Code of Civil Procedure, *supra* note 11.

16. La. Code Civ. P. art. 928.

17. *Id.*

18. La. Code Civ. P. art. 928 provides:

A. The declinatory exception and the dilatory exception shall be pleaded prior to answer or judgment by default. When both exceptions are pleaded, they shall be filed at the same time, and may be incorporated in the same pleading. When filed at the same time or in the same pleading, these exceptions need not be pleaded in the alternative or in a particular order.

B. The peremptory exception may be pleaded at any stage of the proceeding in the trial court prior to a submission of the case for a decision and may be filed with the declinatory exception or with the dilatory exception, or both.

19. See La. Code Civ. P. art. 923.

C. Timing of Exceptions and Waiver by General Appearance

One of the most important considerations in the use of exceptions in Louisiana is timing—when to raise objections to an opponent's pleadings. It would be logical to file objections to subject matter jurisdiction prior to objections to personal jurisdiction and prior to objections to venue. Further, it would make legal sense to require filing the declinatory exceptions, dismissing the cause of action as to *this* defendant, *before* filing any dilatory exception, merely retarding progress of the suit. However, by filing exceptions in the order of significance and awaiting hearings on them before proceeding with the next objection, a defendant would be "stringing out" the pleadings. Restrictions on the time for bringing exceptions are intended to prevent the practice of "stringing out" the pleading of exceptions as a delaying tactic in litigation.²⁰ Thus the desire for judicial efficiency conflicts with the logic of filing the various exceptions.

Improper timing of exceptions frequently results in a party losing the right to raise an objection because the defendant may err and unknowingly make a general appearance. If the party has not restricted his filing to contesting only the jurisdiction of the court, but attempts to employ the powers of the court in his behalf (a seeking of relief), his actions may constitute a waiver of all exceptions to the jurisdiction of the court. As the jurisprudence shows, the concept of the limited appearance has proven to be confusing and of questionable utility. Louisiana Code of Civil Procedure article 7 has injected an unnecessarily technical aspect into Louisiana's law of pleading²¹ that contradicts the intent of the Code.

An example of a timing problem with a declinatory exception (limited appearance) and a peremptory exception (general appearance) is discussed in *International Matex Tank Terminals v. System Fuels, Inc.*²² *International Matex* was a summary proceeding for eviction. System Fuels, Inc., filed two declinatory exceptions at the same time as a peremptory exception. The court of appeal held the filing of the peremptory exception was a general appearance which waived the objections asserted by the defendant in its declinatory exceptions (limited appearances). The supreme court reversed. The court concluded the effect of Louisiana Code of Civil Procedure article 2593 regarding summary proceedings was that the defendant was required by law to file the peremptory and declinatory exceptions simultaneously, and such a filing did not constitute a general appearance nor waive the declinatory exceptions.²³ This case was an example of Article 7 then in existence, which provided "the pleading of

20. Paul L. Billingsley, *Louisiana Law of Exceptions*, 22 Loy. L. Rev. 90, 94-95 (1975-76).

21. Billingsley, *supra* note 20.

22. 398 So. 2d 1029 (La. 1981). See also Howard W. L'Enfant, Jr., *Louisiana Civil Procedure, Developments in the Law, 1980-1981*, 42 La. L. Rev. 676 (1982).

23. *International Matex Tank Terminals*, 398 So. 2d at 1030-31.

other objections . . . the filing of the peremptory exception or an answer therewith *when required by law*, does not constitute a general appearance."²⁴

The defendant in *Ciolino v. Castiglia*²⁵ was not as fortunate. Plaintiff filed a suit via ordinary process for a possessory action. Defendant filed a declinatory exception of *lis pendens* and peremptory exceptions of *res judicata* and prescription in a single pleading. The first circuit concluded that defendant, by filing his declinatory exception with his peremptory exceptions, made a general appearance which waived the objection raised by the declinatory exception.²⁶

Another example of a procedural trap is seen in *Brunet v. Evangeline Parish Board of Supervisors of Elections*,²⁷ in which the Board of Supervisors of Elections filed a declinatory exception of insufficiency of citation. Prior to the filing of this exception, a peremptory exception of no cause of action had already been filed, heard, and sustained, but went to the merits of only one of plaintiff's allegations. The court found that by filing the peremptory exception, defendant affirmatively invoked the jurisdiction of the court (a seeking of relief) to obtain a final disposition of the cause of action asserted. Thus, the defendant made a general appearance prior to filing its declinatory exception, thereby effectively waiving its objection.²⁸

In *Polmer v. Spencer*,²⁹ Spencer filed a declinatory exception of improper venue but, prior to obtaining a court disposition of the declinatory exception, filed a peremptory exception of no cause of action. The court found Spencer waived the objection to venue by making a general appearance—a result of filing the peremptory exception.³⁰

Articles 7 and 928 were amended by Act 60 of 1983. The amendments make it possible for a defendant to file his declinatory, dilatory, and peremptory exceptions together.³¹ Prior to the amendments, if a defendant filed a peremptory exception before, at the same time as, or after a declinatory exception (but before a trial of it), he was deemed to have made a general appearance, waiving his right to decline the jurisdiction of the court by declinatory exception, except on the ground for lack of subject matter jurisdiction.³² If a defendant wished to raise a declinatory exception of improper venue and peremptory exception of no cause of action, he had to raise the declinatory exception first, and delay raising

24. *See id.*

25. 446 So. 2d 1366 (La. App. 1st Cir. 1984).

26. *Id.* at 1369.

27. 376 So. 2d 633 (La. App. 3d Cir.), *writs denied*, 377 So. 2d 1240, 380 So. 2d 623 (1979).

28. *Id.* at 636.

29. 256 So. 2d 766 (La. App. 1st Cir. 1971), *writ refused*, 260 La. 1133, 258 So. 2d 380 (1972).

30. *Id.* at 775. *See also* L'Enfant, *supra* note 22, at 681.

31. However, courts considering a defendant's declinatory exception of jurisdiction, finding that the court in fact had no jurisdiction over the case, have declared themselves incompetent to rule on the other exceptions. *See Foster v. Breaux*, 263 La. 1112, 270 So. 2d 526 (1972). Such a ruling is at odds with the rule that exceptions must be filed together.

32. *See id.*; *Favorite v. Alton Ochsner Medical Found.*, 537 So. 2d 722 (La. App. 4th Cir. 1988).

the peremptory exception until after trial of the former.³³ "The sole purpose of the 1983 amendments to La.C.C.P. arts. 7 and 928 was to make the pleading of exceptions simpler and more efficient by allowing the defendant to file all of his exceptions together. The aim was to simplify pleading of the exceptions, not affect their disposition."³⁴

After these amendments, the majority of the above examples would now be decided differently. What the amendments do not change, but the jurisprudence shows, is that raising a peremptory exception is still considered a seeking of relief—a general appearance—that if filed alone *prior* to filing declinatory or dilatory exceptions, instead of being filed *with* the declinatory and dilatory exceptions, defeats the ability to raise the latter exceptions.³⁵ Why simplify pleading of the exceptions if the timing of filing and ruling on them presents a trap for the unwary?

A well-settled rule of law is that a defendant who does not insist upon a trial and a ruling on his exceptions waives them.³⁶ It is settled law in Louisiana that declinatory and dilatory exceptions not decided by the trial court are considered to be abandoned.³⁷ The peremptory exception, by contrast, is not waived in this manner.³⁸

The consequences of failing to demand a pretrial resolution of the exceptions can be serious. In *Quickkick, Inc. v. Quickkick International*,³⁹ the plaintiff brought suit for alleged damages of \$327,583, claiming breach of a beverage marketing contract. The plaintiff's petition was later amended to add K.S. Adams, the majority stockholder of the defendant corporation, as a co-defendant. Adams raised simultaneous objections of lack of jurisdiction over his person and over the subject matter of the amended petition, and of insufficiency of service of process. On Adams' motion, review of the declinatory exceptions was deferred to be decided with the case on the merits. Adams then filed his answer. After a judgment for plaintiff in the amount of \$263,730 against defendants in solido, Adams contested the jurisdictional issue on appeal.⁴⁰ The appellate court held that, by deferring the jurisdictional issues to the case on the merits, Adams had made a "general appearance" and thus waived his jurisdictional objections.⁴¹

33. *Favorite*, 537 So. 2d at 723.

34. *Bennett v. Giarusso*, 583 So. 2d 607, 609 (La. App. 4th Cir. 1991) (citations omitted). See also La. Code Civ. P. art. 928 cmt. (f).

35. See *Bennett*, 583 So. 2d at 608. See also *Little v. Little*, 513 So. 2d 464 (La. App. 2d Cir. 1987).

36. *Ducote v. Ducote*, 183 La. 886, 165 So. 133 (1935); *The Research Group, Inc. v. Sharp*, 430 So. 2d 165 (La. App. 2d Cir. 1983).

37. *Louisiana Power & Light Co. v. City of Houma*, 229 So. 2d 202 (La. App. 1st Cir.), writ refused, 254 La. 1165, 229 So. 2d 350 (1969).

38. La. Code Civ. P. art. 929.

39. 304 So. 2d 402 (La. App. 1st Cir.), writs denied, 305 So. 2d 123, 306 So. 2d 310 (1974).

40. *Id.* at 404.

41. *Id.* at 405.

Filing an answer subjects the defendant to the jurisdiction of the court *unless* he has first insisted on a decision on his exception to jurisdiction over his person.⁴²

In *Francis v. Travelers Insurance Co.*,⁴³ an uninsured motorist carrier filed a declinatory exception of lack of personal jurisdiction. Without first insisting on a ruling thereon, the insurer answered a petition of intervention and the main demand, and filed a third party demand. The first circuit concluded that Travelers submitted itself to jurisdiction in the plaintiff's forum.

III. PROCEDURAL TRAPS IN FILING MOTIONS

In *Tommaseo v. Tommaseo*,⁴⁴ the plaintiff filed a petition and had it served on his wife's brother, who was her counsel. Mrs. Tommaseo's counsel filed a motion for extension of time within which to plead—a limited appearance under Article 7. The motion was granted. Before expiration of the extended time to plead, Mrs. Tommaseo was personally served with a deposition subpoena. After she refused to attend the deposition, Mr. Tommaseo filed a rule to show cause why his wife should not be held in contempt of court. Mrs. Tommaseo then filed a declinatory exception to the court's jurisdiction based on improper service of process of the petition and, after reserving the rights raised by the exception, filed a motion to continue the contempt hearing. The court ordered her to submit to the deposition. Her counsel then filed an answer, reserving all rights under the previously filed declinatory exception, filed a motion to strike, and propounded interrogatories to Mr. Tommaseo.⁴⁵ Louisiana Code of Civil Procedure article 7 provides expressly that objection to jurisdiction is not waived by filing for an extension of time or by filing an answer when rights under the exception are reserved. The Louisiana Fourth Circuit Court of Appeal held none of the actions taken by Mrs. Tommaseo after filing the declinatory exception waived her objection.⁴⁶ Further, the record reflected persistent, strenuous, but futile efforts to deny the court's jurisdiction.

However, in *Green v. Champion Insurance Co.*,⁴⁷ one of sixteen defendants filed a declinatory exception of improper venue a month after all defendants requested a motion to continue a hearing on whether a preliminary injunction should be issued. The court found that filing a motion to continue constituted a general appearance which waived in advance any objections defendant may have had to venue.⁴⁸

The difference between these two cases is that, even though both defendants filed declinatory exceptions after filing motions, Article 7 expressly exempts only

42. *Atkins v. Atkins*, 588 So. 2d 407, 411 (La. App. 2d Cir. 1991).

43. 581 So. 2d 1036 (La. App. 1st Cir.), *writs denied*, 588 So. 2d 1114, 1121 (1991).

44. 425 So. 2d 938 (La. App. 4th Cir. 1983).

45. *Id.* at 940-41.

46. *Id.* at 941.

47. 577 So. 2d 249 (La. App. 1st Cir.), *writ denied*, 580 So. 2d 668 (1991).

48. *Id.* at 261.

the motion for extension of time from constituting a general appearance. The motion for continuance is not listed in Article 7 as a motion that may properly be filed as a limited appearance. The purposes of filing motions for extensions of time and motions for continuance are similar. A party is seeking additional time under each. The fact that one is a seeking of relief while the other is not may be a trap under certain circumstances. For example, a party being served with a notice of hearing or rule as the first action in a civil case may wish to file a motion for continuance of the hearing to have more time to explore his options. A motion for extension of time would not be the proper pleading to file to continue the court date. Yet by filing the appropriate motion to continue the court date, this defendant is making a general appearance subjecting himself to jurisdiction. Article 7 does not allow this motion to continue to serve as a limited appearance under any circumstances.

These cases serve as examples of procedural traps that still abound in Louisiana law. They conflict with the intent behind the filing of these motions—that defendant is not yet acquiescing to the jurisdiction of the court over him.

Louisiana courts, in conjunction with the legislature, have attempted to reconcile the relationship between exceptions and limited appearances by striving for judicial efficiency and less technicality of pleading. *Bickham* furthers these goals.

IV. *BICKHAM v. SUB SEA INTERNATIONAL, INC.*

Walter Bickham instituted a tort suit against Sub Sea International, Inc. ("Sub Sea"), in the Civil District Court for the Parish of Orleans on June 10, 1992. On June 25, 1992, Sub Sea filed a declinatory exception of improper venue, including its answer within the same pleading. Thereafter, on July 6, 1992, Sub Sea propounded interrogatories and requests for production of documents to Bickham that went to the merits of the case. Bickham voluntarily responded to the discovery. The trial court considered the exception of improper venue in September, 1992, found that venue was improper, and transferred the case to Plaquemines Parish. Bickham took supervisory writs to the Louisiana Fourth Circuit Court of Appeal arguing Sub Sea had waived its declinatory exception of improper venue when it filed the exception in the same pleading as its answer, and had made a general appearance when it served upon the plaintiff certain discovery requests prior to a ruling on the exception.⁴⁹

The fourth circuit held the declinatory exception could be pleaded in combination with the answer and which came first was irrelevant if both were

49. *Bickham v. Sub Sea Int'l, Inc.*, 614 So. 2d 115, 115-16 (La. App. 4th Cir.), *vacated*, 617 So. 2d 483 (1993).

contained in the same pleading.⁵⁰ The fourth circuit further found the discovery propounded by Sub Sea went to the merits of the case, far beyond the scope of the issues raised by the exception. This court held the discovery was a "seeking of relief" as used in Louisiana Code of Civil Procedure article 7. Thus, the request for discovery resulted in a general appearance by Sub Sea and a concomitant waiver of its declinatory exception of improper venue. Propounding discovery that went to the merits of the case was indicative of intent to move the case forward in Orleans Parish and was inconsistent with the actions of a party which intended to resist venue. Such actions constituted a general appearance. The fourth circuit said the trial court should not have considered the merits of Sub Sea's exception of improper venue.⁵¹ Sub Sea applied for supervisory writs to the Louisiana Supreme Court.

The Louisiana Supreme Court, in a per curiam opinion, agrees with the court of appeal that Sub Sea should be allowed to file its exception in the same pleading with the answer before any ruling on the exception,⁵² as did the defendant in the 1880 case of *Tupery v. Edmondson*.⁵³ There is no distinction between the judicial economy gained by allowing a defendant to file a combined exception and answer without a ruling on the exception, and allowing the filing of an answer *after* the exception is filed, but prior to a ruling on it. In fact, the supreme court, recognizing this, agrees "that the subsequent (or simultaneous) filing of an answer, before trial of the exception, does not waive the pending exception."⁵⁴

However, unlike the fourth circuit, the supreme court holds Sub Sea's filing of discovery after filing the exception, but prior to the trial on the exception, did not waive the *pending* exception. Sub Sea's actions constituted a general appearance which would have waived any objections raised by the declinatory exception if the actions had occurred *before* the venue exception was filed, but the general appearance did not waive the pending exception.⁵⁵ The court states that judicial efficiency requires declinatory and dilatory exceptions be filed prior to the answer or general appearance, but no useful purpose exists to judicially extend the requirement to constitute a waiver when the general appearance is made *after* the exception has been filed.⁵⁶

Thus, the stated procedural philosophy of the Louisiana Code of Civil Procedure is followed in *Bickham*. Judicial efficiency is served by allowing an answer to be filed simultaneously with the exception, without having to await a ruling on the exception. Further, technicalities of pleading do not retard progress of the suit. The court holds it is irrelevant whether an answer comes before an

50. *Id.* at 117.

51. *Id.*

52. *Bickham v. Sub Sea Int'l, Inc.*, 617 So. 2d 483, 484 (La. 1993) (per curiam).

53. 32 La. Ann. 1146, 1148 (1880).

54. *Bickham*, 617 So. 2d at 484.

55. *Id.*

56. *Id.*

exception within the same pleading, or whether discovery is commenced prior to a hearing on the challenge to jurisdiction.

This decision by the Louisiana Supreme Court aids attorneys in handling exceptions by providing concrete rules with which to work. However, there remains an inconsistency between the rules found in the Louisiana Code of Civil Procedure for filing exceptions, and the policy reasons behind the use of exceptions.

V. FILING A DECLINATORY EXCEPTION IN THE SAME PLEADING WITH THE ANSWER—A BREAK IN THE LOGIC

All declinatory and dilatory exceptions shall be pleaded prior to answer or judgment by default.⁵⁷ However, "when a defendant makes an appearance,"⁵⁸ all objections which may be raised through the declinatory exception, except the court's lack of jurisdiction over the subject matter of the action, are waived "unless pleaded therein."⁵⁹ Thus, Louisiana Code of Civil Procedure article 925 expressly provides that making an appearance does not in and of itself effectuate waiver of defendant's declinatory exception. Any other interpretation of the phrase "unless pleaded therein" would render the phrase nugatory.⁶⁰

Further, after *Bickham*, the phrase "unless pleaded therein" no longer includes the requirement that the declinatory exception be pleaded first when combined with the answer in a single pleading. The fourth circuit in *Bickham* found that cases holding the declinatory exception must be filed prior to filing an answer or making an appearance were not persuasive:

We agree with those cases, but they do not apply here as they all deal with exceptions filed *subsequent* to the answer or appearance. None of them deal with a declinatory exception of improper venue and an answer that were filed *simultaneously*, much less in the same pleading, as was done in the instant case.⁶¹

57. La. Code Civ. P. art. 928.

58. An appearance may consist of the *filing* of a plea, answer, or demurrer, or may involve signing and *filing* an instrument entering an appearance. Succession of *Bickham*, 518 So. 2d 482, 492 (La. 1988). "Appearance in court" does not mean a personal appearance, but rather means an appearance by having filed an exception, answer, or other pleading. *Texas Mut. Ins. Co. v. Stutes*, 77 So. 2d 43 (La. App. 1st Cir. 1954). See also *Application for Supervisory Writ of Review on Behalf of Sub Sea International, Inc., Defendant-Respondent-Applicant, Bickham v. Sub Sea Int'l, Inc.*, 617 So. 2d 483 (La. 1993) (No. 93-CC-0541).

59. La. Code Civ. P. art. 925 (emphasis added).

60. In Louisiana, when interpreting statutes, it is presumed every word, sentence, or provision in the law was intended to serve some useful purpose, some effect is to be given to each provision, and no unnecessary words or provisions were used. See *Revolta v. Regional Transit Auth.*, 607 So. 2d 963, 964 (La. App. 4th Cir. 1992), *writ not considered*, 612 So. 2d 46 (1993); *Sanchez v. Sanchez*, 582 So. 2d 978, 980 (La. App. 1st Cir. 1991).

61. *Bickham v. Sub Sea Int'l, Inc.*, 614 So. 2d 115 (La. App. 4th Cir.), *vacated*, 617 So. 2d 483

The supreme court, by agreeing with the fourth circuit that the exception and answer may be filed in the same pleading, but failing to address the element of which must first appear, impliedly accepted the fourth circuit's finding and reasoning on that issue.

Article 336 of the Louisiana Code of Practice of 1870, the precursor to Louisiana's current Code of Civil Procedure, provided that declinatory exceptions may be pleaded in the defendant's answer previous to his answering the merits. This article was interpreted to mean the declinatory exception and answer could be filed in the same pleading as long as the exception appeared before the answer.⁶²

The fourth circuit found, however, that consistent with the codal philosophy of abrogating meaningless technicalities, it should not make a difference which comes first in the same pleading—the answer or the exception.⁶³ The fourth circuit, if taken literally, has stated that it is acceptable for a defendant to make a general appearance by answering a plaintiff's suit, and directly below, within the same pleading, to file a declinatory exception contesting venue. However, it is logically inconsistent to use a general appearance when a limited appearance immediately follows. Filing these appearances together does not conform with the intent of filing either, since the function of the limited appearance (challenging plaintiff's choice of forum) is diametrically opposite of the function of the general appearance (preparation for trial in that forum). The goals of judicial efficiency by eliminating meaningless technicalities conflict with the logic and intent behind the rules.

The deviation from the logic of using the declinatory exception to assert a limited appearance is further illustrated by the procedural ease with which the ability to claim the limited appearance may be lost. Participation in discovery serves as an example.

VI. PARTICIPATION IN DISCOVERY PENDING HEARING ON THE EXCEPTION

The discovery propounded in *Bickham* went to the merits of the case, beyond the scope of the issues raised by the exception. The fourth circuit held this discovery was a "seeking of relief" as that term is used in Louisiana Code of Civil Procedure article 7, resulting in a general appearance by Sub Sea and a concomitant waiver of its declinatory exception of improper venue. The supreme court states, however, that the previously filed exception saved Sub Sea from the effect of making a general appearance. Louisiana Code of Civil Procedure article 7 provides: "[A] party makes a general appearance which subjects him to the jurisdiction of the court and impliedly waives all objections

(1993) (emphasis added).

62. *Tupery v. Edmondson*, 32 La. Ann. 1146, 1148 (1880). See also La. Code Practice arts. 334-336.

63. *Bickham*, 614 So. 2d at 117.

thereto when, . . . he seeks therein any relief"⁶⁴ So what is a "seeking of relief"?

A defendant's request for production of a document enabling the court to rule on a venue exception was held not to be a general appearance or a waiver of its exception because the discovery attempt was not to the merits of the case.⁶⁵ Similarly, responding to interrogatories primarily related to issues raised by defendant's exception did not constitute a "seeking of relief";⁶⁶ however, taking depositions regarding the merits of the case did.⁶⁷ The fourth circuit held Sub Sea's interrogatories and request for production had the same effect as taking a deposition.⁶⁸

Counsel for Sub Sea in *Bickham* made the following observation in his writ application to the Louisiana Supreme Court:

The Louisiana Code of Civil Procedure does not exempt defendants who elect to assert declinatory exceptions from the obligation of producing discovery responses within ordinary time limits. If notions of efficiency and judicial economy somehow require complete resolution of all declinatory and dilatory exceptions prior to substantive involvement in the civil discovery process, how can it be said that the efficacy of such mandate depends upon which party propounds and which party answers the civil discovery at issue?⁶⁹

Why should it matter what the scope of discovery is? Why should asking one question be allowable, but asking another question unintentionally subject a defendant to the court's jurisdiction? *Bickham* recognizes that this trap surely does not comport with the goal of elimination of meaningless technicalities; commencement of the civil discovery process is a natural corollary to the filing of a civil lawsuit. The supreme court in *Bickham* holds it is acceptable to commence any discovery once the exception is filed. But what remains unresolved is the logic served by requiring the filing of an exception *prior* to the commencement of discovery.

The court is not normally involved in the discovery process, so participating in discovery should not be a "seeking of relief." Participating in discovery does not always comport with an intent to move the case forward as newly acquired information could *provide* the basis for a declinatory exception. Thus, the

64. La. Code Civ. P. art. 7.

65. *Texaco, Inc. v. Plaquemines Parish Gov't*, 527 So. 2d 1128 (La. App. 1st Cir.), writ denied, 533 So. 2d 359 (1988).

66. See, e.g., *Vincent v. Penrod Drilling Co.*, 372 So. 2d 807 (La. App. 3d Cir.), writ denied, 375 So. 2d 646 (1979); *Stelly v. Quick Mfg., Inc.*, 228 So. 2d 548 (La. App. 3d Cir. 1969).

67. *Stelly v. Quick Mfg., Inc.*, 228 So. 2d 548 (La. App. 3d Cir. 1969).

68. *Bickham*, 614 So. 2d at 117.

69. Application for Supervisory Writ of Review on Behalf of Sub Sea International, Inc., Defendant-Respondent-Applicant at 9-10, *Bickham v. Sub Sea Int'l, Inc.*, 617 So. 2d 483 (La. 1993) (No. 93-CC-0541).

legislature or the courts should take the next logical step—allowing discovery *before* filing a declinatory exception (limited appearance), as in the federal system.

As the law now stands, facts ascertained through the use of discovery providing evidence for new objections which could be filed are useless. By requiring filing of the exceptions first, before commencement of discovery, all other exceptions (other than subject matter and peremptory) are waived. It is too late to use the newly discovered evidence. Conversely, what if the evidence provides proof that the previously filed exception is groundless? Would defendant be subject to sanctions for raising all possible exceptions on his client's behalf, only to find they should not have been raised?⁷⁰

The supreme court's ruling that any discovery may be done *after* the filing of the exception is only a partial release from this procedural trap. Even if discovery is at odds with the logic of the limited appearance, the whole thrust of the code is judicial efficiency and simplicity. Louisiana should allow discovery to be taken prior to filing the declinatory exception, without the fear of having waived the exception by a general appearance. A comparison of Louisiana's procedural system with the federal procedural system, where there is no seeking of relief or limited/general appearance trap, will illustrate why the seeking of relief and limited appearance should be discarded from Louisiana procedural law.

VII. THE FEDERAL SYSTEM

A. Appearance Under Federal Law

In 1934, the United States Supreme Court adopted a combined set of rules for cases of law and equity to use in federal district courts. These rules—the Federal Rules of Civil Procedure—went into effect in 1938.

In the words of the late Henry George McMahon, former Dean of the Louisiana State University Law School and reporter of the Louisiana Code of Civil Procedure:

Some of the new procedural devices and concepts of the Federal Rules were radical, and perhaps even revolutionary. The new form of pleading was, to say the least, novel. If common law pleading may be regarded as *issue* pleading, and code pleading as *fact* pleading, then pleading under the Federal Rules must be characterized as a modified form of *notice* pleading. . . . [A]nother innovation, long overdue, was the simple but most effective discovery procedures made available under the Federal Rules. . . .

. . . [P]erhaps the most revolutionary change made by these new rules was the change of *procedural philosophy*. The "inexorable logic of common law procedure" was no longer tolerated. *Procedure was*

70. See La. Code Civ. P. art. 863.

merely a means to an end, and not an end in itself. Hence, as far as possible, the decision of lawsuits was to depend on the facts of the case and applicable principles of substantive law. *The outcome should not depend on technical procedural rules.* . . .

. . . [A] number of states have discarded their prior procedural rules and adopted a system substantially identical, and in a few cases identical, with the new federal practice. . . . [T]he procedural philosophy of the Federal Rules has stimulated interest in procedural reform, and a large number of states have adopted some of the more workable procedural devices of federal practice. Some of the very best features of the new Louisiana Code of Civil Procedure were borrowed outright from the Federal Rules of Civil Procedure.⁷¹

But, unlike many of the best features of the Louisiana Code of Civil Procedure which closely track the federal rules, the Louisiana law of exceptions and the majority of the law regarding the limited appearance *predate* the federal rules.

Prior to adoption of the federal rules, the practice in federal court was to appear specially (by limited appearance) for the purpose of objecting by motion to the jurisdiction of the court, the venue of the action, or an insufficiency of process or service of process. Failure to follow the correct procedure often resulted in a waiver of the defense.⁷²

The current federal rules of civil procedure make no distinction between general and special appearances.⁷³ As Judge Maris stated in *Orange Theatre Corp. v. Rayherstz Amusement Corp.*:⁷⁴

Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in.

Federal Rule of Civil Procedure 12(b) provides as follows:

71. Henry G. McMahon, Introduction to Civil Procedure, Course Outlines and Selected Readings, pt. 1, at 15-16 (1965) (emphasis added).

72. 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1344, at 166-67 (1990). See also Palmer D. Edmunds, *The New Federal Rules of Civil Procedure*, 4 J. Marshall L.Q. 291, 304 (1938).

73. Wright & Miller, *supra* note 72, §§ 1344, 1362, at 166-67, 451. See also *Chase v. Pan-Pacific Broadcasting, Inc.*, 750 F.2d 131 (D.C. Cir. 1984).

74. 139 F.2d 871, 874 (3d Cir.), *cert. denied*, 322 U.S. 740, 64 S. Ct. 1057 (1944).

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

Therefore, every defense may be made either in the responsive pleading or by motion; joinder of defenses and objections results in waiver of none. It is apparent Rule 12 has, without expressly stating, abolished in federal practice the distinction between general and special appearances.⁷⁵

The federal emphasis is no longer on the nature of the appearance, but rather on the precise character of the objection or defense interposed. Federal Rule 12(b) enables counsel to incorporate into a single pleading all preliminary objections to the proceeding as well as all defenses to the merits of any counterclaims without being concerned that any valid defense or objection may inadvertently be waived.⁷⁶ In federal court the objection of lack of jurisdiction over the person is not waived (as in Louisiana) by a voluntary appearance, by obtaining extensions of time, by taking depositions or otherwise participating in discovery, or by removing an action from a state to a federal court.⁷⁷ Further, the federal rules allow a defendant to timely amend his answer to raise additional defenses found during discovery.

It appears that implementation of the Federal Rules of Civil Procedure eliminated many of the procedural traps which continue to plague attorneys practicing in Louisiana's state courts. Considering Louisiana's procedural philosophy—lawsuits should not turn on hypertechnical rules of procedure—it is amazing how technical Louisiana rules remain when compared with the federal rules.

B. Comparison of Federal Rules and Louisiana Rules of Civil Procedure

A great difference between the federal and state rules is the number of objections raised by motion under the federal rules. Louisiana's three exceptions

75. 1 Richard A. Givens, *Manual of Federal Practice* 422 (4th ed. 1991). See also *Orange Theatre Corp.*, 139 F.2d at 874.

76. Wright & Miller, *supra* note 72, § 1344, at 171.

77. See generally 2A James W. Moore & Jo D. Lucas, *Moore's Federal Practice* ¶ 12.12 (2d ed. 1994); Dag E. Ytrebert, Annotation, *Stipulation Extending Time to Answer or Otherwise Proceed as Waiver of Objection to Jurisdiction for Lack of Personal Service*, 30 A.L.R. Fed. 584 (1976).

encompass twenty different objections;⁷⁸ the federal rules provide for only seven objections to be filed in a 12(b) motion or by answer. Of the seven federal objections, five are essentially the same as the objections included in Louisiana's declinatory exception.⁷⁹ The sixth, a motion for dismissal for failure to state a claim upon which relief can be granted, is the equivalent of Louisiana's objection of no cause of action.⁸⁰ The seventh, a motion for dismissal for failure to join a party under Rule 19, encompasses the Louisiana peremptory objection of failure to join an indispensable party as well as the dilatory exception of absence of a necessary party.⁸¹ All other objections raised by exceptions in Louisiana are either recognized as affirmative defenses to be pleaded in the answer or are simply not specified in the rules.⁸²

Federal Rule 8(c) provides in part as follows:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction . . . statute of limitations, waiver, and *any other matter constituting an avoidance or affirmative defense.*⁸³

Because of the phrase "and any other matter constituting an avoidance or affirmative defense," most of the 20 objections that must fit into one of Louisiana's three exceptions may be pleaded generally in the answer in a federal suit.⁸⁴

Whether properly raised by motion or by affirmative defense, an objection under the federal rules is waived if it is not timely urged. The failure to plead an affirmative defense generally results in a waiver of that objection and its exclusion from the case.⁸⁵ However, should the defendant fail to raise an affirmative defense, he may amend the answer in accordance with Rule 15(a).⁸⁶

78. La. Code Civ. P. art. 925 provides for declinatory exceptions of insufficiency of citation, insufficiency of service of process, lis pendens, improper venue, lack of personal jurisdiction, and lack of subject matter jurisdiction. La. Code Civ. P. art. 926 provides for dilatory exceptions of prematurity, want of amicable demand, unauthorized use of summary proceeding, nonconformity of the petition with the requirements of Article 891, vagueness, lack of procedural capacity, improper cumulation of actions, nonjoinder of a necessary party, and discussion. La. Code Civ. P. art. 927 provides for peremptory exceptions of prescription, res judicata, nonjoinder of an indispensable party, no cause of action, and no right of action.

79. Compare Fed. R. Civ. P. 12(b) with La. Code Civ. P. art. 925.

80. La. Code Civ. P. arts. 422-428.

81. La. Code Civ. P. arts. 641-647.

82. Billingsley, *supra* note 20, at 116.

83. Fed. R. Civ. P. 8(c) (emphasis added).

84. See generally Wright & Miller, *supra* note 72, §§ 1270-1271, at 429-34.

85. *Id.* § 1278, at 477.

86. Fed. R. Civ. P. 15(a) provides in part:

A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so

In some cases, he may even do so at trial. When evidence is introduced into the record without objection, Rule 15(b) treats the pleadings as being amended to conform to the evidence. If an objection is raised, an appropriate amendment may be allowed if the opposing party has not been prejudiced by the failure of the proponent to have raised the defense at an earlier time.⁸⁷

The waiver of objections is described in Rule 12(h).⁸⁸ Objections of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service are all waived if not raised by motion under Rule 12(b) or if not pleaded in the answer. There are only three defenses or objections which are not thus waived and which can be made as late as the trial in federal court: (1) defense of failure to state a claim, (2) defense of failure to join an indispensable party, and (3) objection of lack of subject matter jurisdiction.⁸⁹ All objections listed in Rule 12(b)(1) must be consolidated in the same pleading, be it the 12(b) motion or the answer.

Rule 12 avoids dilatory motions, yet affords the parties adequate opportunity to present all defenses and objections.⁹⁰ Rule 12 is designed to avoid the delays occasioned by successive motions and pleadings and to eliminate the necessity for asserting jurisdictional defenses by special appearances.⁹¹ Louisiana should adopt similar appearance provisions since Federal Rule 12 meets the procedural philosophy stated in the Louisiana rules. Allowing the filing of any objections to jurisdiction, venue, and service together with the answer and any affirmative defense is consistent with avoiding "stringing out" the pleadings and meaningless technicality of procedure. While it is true that the federal system is likewise logically inconsistent—it allows an answer to be combined with an objection equivalent to Louisiana's declinatory exception—there is no trap for the unwary.

Under the federal rules, allegations on the merits in the answer do not waive or impair challenges to venue, jurisdiction over the person, process, service of process, or other defenses raised in the same proceedings.⁹² Louisiana Code of Civil Procedure article 7, which permits joinder of jurisdictional and nonjurisdic-

amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

See also *Pierside Terminal Operators, Inc. v. M/V Floridian*, 423 F. Supp. 962 (E.D. Va. 1976); *Bernstein v. Gluck*, 7 F.R.D. 201 (S.D.N.Y. 1947).

87. Fed. R. Civ. P. 15(b).

88. Fed. R. Civ. P. 12(h) provides in part:

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

89. *Givens*, *supra* note 75, at 420.

90. *Id.*

91. *Wright & Miller*, *supra* note 72, § 1362, at 450-51.

92. *Id.* at 452. See also *Housing Auth. v. Millwood*, 472 F.2d 268 (5th Cir. 1973).

tional exceptions, would at first appear to be different from Federal Rule 12 only in the respect that the federal rule explicitly permits the filing of objections with the answer. However, *Bickham* now allows the same thing; exceptions may be filed with the answer.

Because there is only one appearance in federal court, all answers and objections are filed together without the limited/general appearance trap found in Louisiana procedure. The "trap" is that, even though in Louisiana a defendant files a declinatory exception (limited appearance), he may unknowingly waive the exception if he performs any act constituting a seeking of relief other than as set out in Louisiana Code of Civil Procedure article 7.⁹³ The problem lies in determining in advance what Louisiana courts will construe as an attempt to "seek relief" from the court other than that stated in the article. Considerable care must be taken to ensure that a general appearance has not been made which would unwittingly subject defendant to jurisdiction of the court.

VIII. WHY *BICKHAM* DID NOT GO FAR ENOUGH

A. *Timing of Discovery*

Federal Rule 12 allows discovery *prior* to filing any answer or motion, without fear of a waiver of the right to file objections and defenses.⁹⁴ In the federal system, waiver occurs by failing to raise those four objections by 12(b) motion or answer, whichever defendant files first. Waiver does not occur by any other action by defendant, such as discovery. In Louisiana, this same discovery, if to the merits of the case, would constitute a general appearance that would waive the right to file those same objections (Louisiana's exceptions). It matters not that the court is not even involved in the discovery process, no pleadings are filed, and no judicial "relief" is sought.

Parties should be able to take all desired discovery, even going to the merits of the case, prior to filing an answer or exception, as in the federal system. Attorneys should not have to worry about procedural traps—performing actions that constitute general appearances subjecting their clients to the jurisdiction of the court—when such was not their intent. *Bickham* indicates that the only reason participation in discovery did not constitute a general appearance was due to the previously filed exception. But, if new grounds for additional exceptions are discovered, is it too late to file the exceptions because all had to be filed together prior to the participation in discovery? Are these new grounds waived by participating in discovery? If discovery gives new grounds for a declinatory exception of lack of jurisdiction, yet the right to file the exception has been waived by mere participation in discovery, there is no right to contest jurisdiction. This procedural trap does not occur under the federal rules.

93. La. Code Civ. P. art. 7.

94. See Moore & Lucas, *supra* note 77, ¶ 12.12, at 12-126.

Will this lead to sanctions? File an exception that may ultimately be defeated to protect the client from jurisdiction of the court, then look for reasons to support the exception by participating in discovery?⁹⁵ Federal procedure allows discovery to be taken prior to answer or motion. Louisiana should move in the same direction.

B. Proposed Revisions in Louisiana Procedural Laws

Problems have arisen in Louisiana procedural practice which could be reduced or eliminated by adoption of portions of the federal rules. Confusion exists concerning what constitutes a "general appearance" and the rather technical rules of pleading objections and unintentional waivers thereof. Experienced attorneys who practice in both Louisiana state courts and in federal courts are confused by the differing rules of raising objections. Another problem is the apparent lack of economy in state court pleadings. While the federal rules permit the filing of responsive pleadings in one instrument (the answer), the Louisiana Code of Civil Procedure, depending on the objections raised, requires one, possibly two, filings in addition to the answer—the combined dilatory and declinatory exception, and the peremptory exception which may be separately filed.⁹⁶

It is proposed that Louisiana eliminate the limited/general appearance trap found in Article 7 of the Louisiana Code of Civil Procedure, and adopt the manner of pleading found in Federal Rule 12. Emphasis no longer would be on the nature of the appearance, but rather upon the precise character of the objection or defense interposed. Economy of pleading would be had, attorneys would benefit from the similarity in federal and state procedure, and liberal pleading requirements would avoid many of the procedural traps now encountered in Louisiana practice.

The *Bickham* court made two steps toward aligning Louisiana with federal procedure. First, by allowing the exceptions to be filed with the answer, Louisiana procedure has gained judicial economy, consistency with the federal system, and a less technical approach to pleadings. The defendant is released from being concerned with the timing of the exceptions. With regard to a ruling by the court, the objections would still be processed as preliminary matters unless the trial judge specifically exercises his discretion to refer the objections to the merits.⁹⁷ Second, the defendant may now confidently engage in any discovery after filing the exception. He may initiate the discovery and extend it to the merits of the case.

The late Henry G. McMahon noted that among the objectives of the Louisiana Code of Civil Procedure was the elimination of meaningless procedural

95. Sanctions are provided for in La. Code Civ. P. art. 863.

96. Billingsley, *supra* note 20, at 108, 127-29.

97. See La. Code Civ. P. art. 929 cmts. (a) and (b).

technicalities—procedural traps for the unwary. It is submitted that the recent ruling in *Bickham v. Sub Sea International, Inc.*, is a partial release from a procedural trap.

Robin Ward Bueche